Nos. 90-1367, 90-1368, 90-1378

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

W.R. GRACE & CO., et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herbert B. Newberg*
Harvey S. Kronfeld
Sandra L. Duggan
Roger P. Cameron
HERBERT B. NEWBERG, ESQ., P.C.
510 Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 922-4740

David Berger*
Harold Berger
Warren D. Mulloy
Howard I. Langer
Thomas F. Hughes
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Co-Lead Counsel for Respondents - Class Plaintiffs
*Counsel Of Record

Of Counsel:

Charles Alan Wright, Esquire
727 E. 26th Street
Austin, TX 78705

Arthur R. Miller, Esquire
1545 Massachusetts Avenue
Cambridge, MA 02138

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

Arnold Levin, Esquire
Laurence S. Berman, Esquire
Levin, Fishbein, Sedran & Berman
320 Walnut Street, Suite 600
Philadelphia, PA 19106

Chair, Trial and Liability Committee for Respondents - Class Plaintiffs

Stanley J. Levy, Esquire
Levy Phillips & Konigsberg
90 Park Avenue, 31st Floor
New York, NY 10016

Alvin B. Lewis, Jr., Esquire
Hartman, Underhill & Brubaker
221 East Chestnut Street
Lancaster, PA 17602

Daniel A. Speights, Esquire
Speights & Runyan
304 Lee Avenue
P.O. Box 685
Hampton, SC 29924

E. Robert Wright, Esquire
Thomas, Snell, Jamison,
Russell, Williamson & Asperger
2445 Capital St., P.O. Box 1461
Fresno, CA 93716

Ernest G. Kelly, Jr., Esquire
Evans, Petree, Cobb & Edwards
81 Monroe Avenue, Ste. 600
Memphis, TN 38103

Sweeney, Esquire
1500 Alluminating Building
55 Public Square
Cleveland, OH 44113

W. Robert Morgan, Sr., Esquire
Morgan Law Offices
1651 North First Street
San Jose, CA 95112

Ellen Chapnick, Esquire
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, NY 10022

Edward J. Westbrook, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
Charleston, SC 29402

Frank J. Daily, Esquire
Quarles & Brady
411 E. Wisconsin Avenue
Milwaukee, WI 53202-4497

Zell Davis, Jr., Esquire
McGee Jordan Shuey Gordon
Morris & Doner, P.A.
2328 10th Ave, North, Ste 300
Lake Worth, FL 33461Robert E.

Martin Greitzer, Esquire
Greitzer & Locks
1500 Walnut St., 21st Floor
Philadelphia, PA 19102

Respondents-Class Plaintiffs' Executive Committee

Dated: March 29, 1991

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CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUMMARY OF ARGUMENT

This Brief is a consolidated response to three separate petitions for writs of certiorari (Nos. 90-1367, 90-1368 and 90-1378) to review decisions of the Third Circuit on issues of class certification. This class action is a part of the multitude of litigation arising out of asbestos, an unparalleled situation in American tort law and an unprecedented challenge to traditional methods of judicial administration.

This action was commenced more than eight years ago, seeking to recover for property damage resulting from the use of asbestos in school districts throughout the country. In 1984 the district court certified a class action pursuant to Civil Rule 23(b)(3) and, on an appeal allowed under 28 U.S.C. § 1292(b), that part of the district court's order was affirmed by the Third Circuit in 1986.[1] As Judge Weis wrote then,

> our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.

789 F.2d at 1011. This Court denied two separate petitions for writs of certiorari seeking to set aside that decision.[2]

In the five years since then much progress has been made. Discovery has revealed the facts and significantly narrowed the issues. Settlements totaling in excess of $40 million have been reached between the class and six of the defendants. The district court is ready to begin trial this Summer or early Fall, 1991.

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1. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986).

2. *Celotex Corp. v. School District of Lancaster*, 479 U.S. 852 (1986); *National Gypsum Co. v. School District of Lancaster*, 479 U.S. 913 (1986).

Some defendants, having previously tried unsuccessfully to prevent this case from going forward as a class action, have now attempted once more to thwart the efforts of the district court to cope with the unprecedented situation this case presents. The Third Circuit has rebuffed their attempts to use the extraordinary writs of mandamus and prohibition to reargue the propriety of class treatment of this action.[1] Now they come yet again to this Court and ask it to put an end to the fruitful and imaginative efforts of the district court.[4]

W.R. Grace petitioners, **No. 90-1368**, seek certiorari to review both the trial court's discretionary, interlocutory ruling denying their motion for class decertification in this school asbestos property damage class action and the Third Circuit's mandamus denial. These petitioners previously had full interlocutory review under 28 U.S.C. § 1292(b) of the initial class certification ruling.[5] After denial of their subsequent motion for class decertification,[6] petitioners sought a second immediate review of the class status of this action through a writ of mandamus, without ever having requested certification for interlocutory review under § 1292(b). After hearing below, the mandamus petition was dismissed by the court of appeals.[7] W.R. Grace petitioners have offered no reason why this class ruling is special or important for this Court to review by certiorari, nor have they demonstrated any circumstances why they are clearly and indisputably entitled to invoke this extraordinary relief. This petition for certiorari is facially without merit both in fact and in law.

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1. *In re School Asbestos Litigation*, 921 F.2d 1310, 1330, 1338 (3d Cir. 1990), 3 cases; U.S. Gypsum App. at 1a, 15a and Grace App. at 1a, respectively.

4. This case exemplifies the beneficial use of class actions in asbestos litigation as recommended in the REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION TO THE CHIEF JUSTICE OF THE UNITED STATES (Mar. 12, 1991).

5. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986), 2 cases.

6. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 201 (E.D. Pa. Jan. 12, 1990), Grace App. at 17a.

7. *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990), Grace App. at 1a.

U.S. Gypsum petitioners, **No. 90-1378**, seek a writ of certiorari on the grounds (1) that the district court allegedly lacks jurisdiction to hear this class action because when first certified, some of the 35,000 absent members, not now identifiable, did not and might not be able to allege the jurisdictional amount requirement, and (2) that there is an alleged novel issue presented regarding diversity of citizenship jurisdiction in a class action. Petitioners' mandamus writ was denied by the court of appeals.[8]

All prerequisites of class action Civil Rule 23(a) have been satisfied here, including the numerosity test. It never has been disputed that the district court has diversity jurisdiction to hear the claims of the named plaintiffs and of a sufficiently large number of the absent-class-member school districts within its jurisdiction[9] to permit the class action to be maintained. Moreover, as a result of the district court's December 17, 1990 order[10] (four days after the court of appeals' decision) which limited the class, the class now includes "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material"[11] (which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, or which otherwise is easily damaged), and who have damages over $10,000.[12] Defendants have not con-

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8. *In re School Asbestos Litigation*, 921 F.2d 1330 (3d Cir. 1990); U.S. Gypsum App. at 1a.

9. *I.e.*, those schools who have alleged in the Amended Complaint claims for damages in excess of $10,000 arising from friable asbestos-containing products in their school buildings.

10. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 273 and Memorandum (E.D. Pa. Dec. 17, 1990), 1990 WL 236016 (App. 1a).

11. *In re Asbestos School Litigation*, Master File No. 83-0268, Memorandum accompanying Pretrial Order No. 273 at 1 (E.D. Pa. Dec. 17, 1990); App. A-2.

12. Allegations in the Amended Complaint in force before December 17, 1990 stated that the class consisted of, among others, members whose buildings have or had friable asbestos-containing materials and who incurred damages more than $10,000. U.S. Gypsum App. at 82a, 91a. The Amended Complaint also noted that some small number of members may have damages less than $10,000. *Id.* Therefore, on December 17, 1990, the district court

tested the good faith allegation that each class member with friable asbestos in a school building who seeks compensatory and punitive damages has a claim exceeding $10,000. Thus, this part of the jurisdictional allegation was also not a contested issue before the court of appeals.

Moreover, it is undisputed that from the outset, there has been complete diversity of citizenship between all named class representatives and all defendants from each of the three consolidated complaints. There are, concededly, absent class members who are not diverse from defendants. This does not raise, however, a novel issue before the Court. It was decided many years ago by this Court that diversity of the named parties only is sufficient in representative suits, and this recently has been reaffirmed by Congress.

Kaiser Cement, **No. 90-1367**, challenges the Third Circuit's affirmance of the district court's final approval under Rule 54 b) of a partial class settlement with a codefendant. Not only does Kaiser Cement, a nonsettling defendant, lack standing to object to the settlement, but it has not shown any immediate prejudice from the settlement order, and it acknowledges that a term of the settlement was designed to protect nonsettling defendants' contribution and indemnity rights. The only alleged prejudice raised by Kaiser Cement involves a speculative and hypothetical possibility that a class member might challenge the settlement in a future proceeding in a different court. However, if that occurred and if the challenge were successful, the settlement necessarily would be voided as to that class member and consequently nonsettling defendants, including Kaiser Cement, would be free to seek contribution and indemnity in that proceeding by way of a third party complaint against the settling defendant. In any event, jurisdictional amount issues are now moot.

NOTES: *Continued*

effectively eliminated from the class these members with damages less than $10,000.

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S REFUSAL TO GRANT MANDAMUS ON THE TRIAL COURT'S DISCRETIONARY RULING DENYING CLASS DECERTIFICATION.

Both of the Questions Presented by the W.R. Grace petitioners go to the decision of the Third Circuit that this was not an appropriate case for mandamus review of the denial of their class decertification motion. But only recently this Court has said once again that "the granting of an extraordinary writ is, in itself, extraordinary. *In re McDonald*, 489 U.S., at 184-185, 109 S.Ct., at 996; see *Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S.Ct. 2119, 2123-2124, 48 L.Ed.2d 725 (1976)." *In re Sindram*, 111 S.Ct. 596, 597 (1991). Particular litigation hardships that might be suffered as a result of a discretionary, conditional, interlocutory order are not sufficient grounds for granting mandamus. "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Mandamus will not lie to correct a trial judge's exercise of discretion. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

Contrary to what petitioners contend, the Third Circuit did not adopt a rigid rule against mandamus in reviewing a class status ruling. It simply followed the established rule that mandamus hardly ever is appropriate to review such a ruling, reaffirming what it previously held in *DeMasi v. Weiss*, 669 F.2d 114 (3d Cir. 1982). As Judge Aldisert wrote:

> We do not write on a clean slate here. . . . In *DeMasi*, we held clearly that "a class action determination, affirmative or negative, is not a final order appealable under 28 U.S.C. § 1291." 669 F.2d at 119, that the only route open "for interlocutory review of the grant or denial of class certification, **at least in this case**, is pursuant to 28 U.S.C. § 1292(b)," *id.*, and that "[w]e will not employ mandamus in this case to circumvent these precepts." *Id.* **There are no circumstances in the matter before us now that were not present in *DeMasi*.**

(Grace App. at 9a) (citations omitted; emphasis added).

Petitioners overlook the fact that in the passage Judge Aldisert quoted from *DeMasi*, the court there spoke of "at least in this case" and again said "in this case." After that quotation Judge Aldisert said that there were "no circumstances in the matter before us" to require a different result. Words could hardly make it clearer that the court below was making a sensitive appraisal of particular cases and not, as petitioners would have it, announcing a categorical imperative.

In *DeMasi*, as here, petitioners never sought interlocutory review of the discretionary, conditional class ruling under 28 U.S.C. § 1292(b), which would have been an adequate alternative means for interlocutory review, and petitioners still had and have adequate means to review that ruling after final judgment. Petitioners' suggestion that as a practical matter there was no opportunity for effective interlocutory appellate review is belied by their admission that they were successful at an earlier stage before this same trial court in obtaining a Section 1292(b) certificate and the Third Circuit did review the class certification, affirming in part and reversing in part. (Grace Petition at 4, *citing, In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852, 915 (1986)(2 cases)). Having had one full opportunity for interlocutory review, petitioners are now seeking in the eighth year of this litigation to disrupt the district court proceedings for a second time by rearguing the same issues before the Third Circuit.

Under these circumstances, the Third Circuit understandedly denied petitioners' attempt to circumvent well-settled principles governing the use of this extraordinary and drastic mandamus relief. No other circuits are in conflict with these familiar precepts. It is not coincidence that almost all of the purported conflicting cases cited by petitioners were decided in 1974-1977, before this Court clarified the rules about mandamus in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).[14] Nor

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14. In addition, these cases were decided before 1978 when this Court greatly cut back on immediate review of class certification decisions. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-470 (1978) (rejecting "death knell"

are any of the more recent cases cited by petitioners in conflict with the decision below, and, in any event, each is manifestly distinguishable from this case, which involves a petition for mandamus review of a trial court's provisional, discretionary order denying decertification in a Rule 23(b)(3) opt-out class action.[14]

Nor are the W.R. Grace petitioners any better off when they assert that it was an abuse of discretion for the Third Circuit not to grant them the writ they sought. The power to issue mandamus exists only when the litigant's right to the writ is "clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). It cannot be an abuse of discretion not to issue the writ to reverse an order denying class decertification when other adequate alternative means existed and exist for petitioners to obtain the relief they seek. It is conceded that the district court acted within its jurisdiction in denying class decertification. It is conceded that petitioners never sought certification under Section 1292(b) of the order challenged here. It is conceded that petitioners had had full interlocutory review by the Third Circuit of the 1984 class certification order, following which certiorari was denied by this Court.

In addition to all this, review at this stage of the denial of decertification of the class would be wastefully premature. Under Civil Rule 23(c)(1) a class ruling "may be 'altered or amended before the decision on the merits.' Thus, a district

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and "collateral order" theories of review). *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (rejecting appeal under 28 U.S.C. §1292(a)(1)). "If there is to be immediate review of a class certification ruling, it must be by allowance of an interlocutory appeal under 28 U.S.C. §1292(b)." C. Wright, Federal Courts §101 at 704 (4th ed. 1983), citing *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 330 n. 8 (1980).

14. Three of those decisions dealt with certification of a mandatory no opt-out class for damages, two of them in a class settlement context. *In re Temple*, 851 F.2d 1269 (11th Cir. 1988) (mandatory limited fund class certified without record support, together with an injunction against all pending actions); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987) (mandatory settlement class for damages); *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (mandatory settlement class for damages). Also distinguishable is *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (mandamus review of a class trial plan).

court's order denying or granting class status is inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). This fact was explicitly recognized by the Third Circuit in 1986 when it upheld the initial certification of the class. "We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." 789 F.2d at 1011. If the trial court should ever find that this litigation cannot be managed, it has full power to decertify the class. Surely an appellate court should not interfere by extraordinary writ when, as in this case, experience thus far has shown that use of the class action was a wise and productive decision.[15]

II. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE NOW MOOTED ISSUE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT WHEN THE DISTRICT COURT USED DISCRETION TO DEFER DISMISSING SOME CLASS MEMBERS.

The U.S. Gypsum petitioners, in their Question 1, and Kaiser Cement, in its Question I(a), challenge the decision of the district court to defer dismissing from the class those members whose claims do not reach the applicable $10,000 requirement for amount in controversy.[16] Of course it is true

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15. The extensive discussion by the W.R. Grace petitioners (Grace Petition at 6-10, 15-19) of the problems they think will arise from Pretrial Order No. 253, governing trial structure, is also premature, and is not properly before this Court. That Order was entered on May 17, 1990 (Grace Petition at 1-2, 21a). The writ of mandamus that was sought from the Third Circuit was directed to the denial of decertification in Pretrial Order No. 203, entered on January 12, 1990 (Grace App. at 17a). The May 17th order was not before the Third Circuit on the mandamus petition and would not be before this Court if certiorari were to be granted.

16. This issue arose from plaintiffs' amended jurisdictional allegation that "The plaintiff and all members of the class (except a minimal portion thereof),

that every member of the class must satisfy the amount requirement of the statute. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But there are three independent reasons why the action of the trial court is wholly consistent with *Zahn* and why this is not an issue worthy of this Court's attention.

First, the trial court was acting pursuant to the specific authority conferred by Civil Rule 12(d). That rule says that a motion challenging subject-matter jurisdiction is to be heard before trial "unless the court orders that the hearing and determination thereof be deferred until the trial." The district court did exactly what the rule allows it to do. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Mandamus surely cannot issue to challenge a district court's exercise of discretion explicitly given to it by rules promulgated by this Court.[17]

Second, these petitioners forget — or deliberately ignore — that the district court undoubtedly had and has jurisdiction of the action. The question is at most whether certain unnamed members of the class are to be excluded from the class now or at a later time. The lower court is not proceeding "as a court of general, rather than limited, jurisdiction." (U.S. Gypsum Petition at 20). It is going forward to decide a case of which it surely has jurisdiction. At a later time it will determine whether all of the school districts described as members of the class are bound by the judgment. The U.S. Gypsum petitioners say (p. 20) that the ruling below means that "[a] plaintiff need no longer use a key to open the federal courthouse door, because the door is already open; the district court can now *presume* it has the

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have claims in excess of $10,000 . . . . Entities not now identified may exist which own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be recoverable who cannot allege $10,000 in controversy." Amended Complaint in *School District of Lancaster v. Lake Asbestos of Quebec*, No. 85-0398 (E.D. Pa.), 4 U.S. Gypsum App. at 82a, 91a.

17. The U.S. Gypsum petitioners claim they are entitled to an immediate decision under Civil Rule 12(h)(3), but Rule 12(h) indicates only when particular kinds of objections must be raised to avoid waiver. Rule 12(d) prescribes when motions are to be determined.

authority to resolve claims until proof to the contrary is presented." They are right that "the door is already open", but it is open because there are named plaintiffs with claims for more than $10,000 and citizenship diverse to that of defendants. The question is how many school districts can be allowed to go through the open door, and that turns on facts about individual districts that would be burdensome and unnecessary to decide at the present stage.

Third, any issue about amount in controversy is now out of the case. On December 17, 1990, four days after the decisions from the Third Circuit that are now being challenged before this Court, the district court amended the class definition to include "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building materials" and thus "only those school districts that can in good faith assert claims in excess of $10,000." Pretrial Order No. 273 and accompanying Memorandum at 1 (App. A-2). The class has now been limited in just the fashion that petitioners are urging, and their contentions in this regard are moot.

III. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW LONGSTANDING JURISPRUDENCE OF THE APPLICATION OF THE COMPLETE-DIVERSITY RULE IN REPRESENTATIVE ACTIONS.

Kaiser Cement, in its Question 1(b), and the W.R. Grace petitioners, in their Question 2, question whether the statutory requirement of diversity has been properly applied in this case. Indeed it has - but the question in any event would not merit the attention of this Court.

It is literally hornbook law that in a class action based on diversity of citizenship only the named parties need be considered in determining diversity. "It has long been the rule that in a class action only the citizenship of the named representatives is to be considered, and that it is no objection to jurisdiction that other members of the class, not named as parties, are of such citizenship as would defeat diversity." C. Wright, FEDERAL COURTS §72 at 484 (4th ed. 1983). The rule has its origin in the

well-known case of *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Court held that there can be no aggregation of the claims of class members to meet the statutory requirement of amount in controversy, but it noted with regard to diversity that: "[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant * * *." 394 U.S. at 340.

Petitioners assert that *Finley v. United States*, 490 U.S. 545 (1989), has changed this rule. Their interpretation of Finley is wrong. The fact is that there is not even a dictum, much less a holding, in *Finley* about class actions. It may be for that reason that the petitioners seek to put this into a larger context. The U.S. Gypsum petitioners say that "whether 'limited' diversity is sufficient in class actions has never been resolved by the Court" and that it ought to "address this important issue." (p. 29). Kaiser sees "ambiguity" (p. 25) about that question, but Kaiser paints a poignant picture of Congress caught up in "a 'judicial reform' tug of war" (p. 16) and argues that this case should be used "to provide guidance to the Congress as the ultimate arbiter of the extent to which federal courts should be statutorily empowered to hear state law claims." (p. 13; *see also* p. 17).

What all this pretty rhetoric ignores is that Congress has spoken to the problem. The Judicial Improvements Act of 1990 gives a clear answer. The purpose of that Act was "to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." H.R. Rep. No. 734 at 13, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S. Code Cong. & Ad. News, 6860, 6861. That Committee, feeling that "[r]ecent decisions of the Supreme Court raise doubts about the scope of pendent party and ancillary jurisdiction under existing federal statutes," REPORT OF FEDERAL COURTS STUDY COMMITTEE 47-48 (1990), recommended that "Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." *Id.* at 47. As a distinguished member of the Study Committee,

former Solicitor General Rex Lee, said bluntly, this was intended "to overrule the restrictions on supplemental jurisdiction created by *Finley*." Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 333.[18] Congress responded by adopting 28 U.S.C. § 1367, Act of Dec. 1, 1990, Pub. L. 101-650, § 310, 104 Stat. 5089. Under subsection (a) of § 1367, district courts now have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Subsection (b) then limits supplemental jurisdiction with regard to some uses of Rules 14, 19, 20 and 24. Subsection (b) does not limit supplemental jurisdiction over counterclaims and cross-claims under Rule 13, impleader of a third party under Rule 14 (as opposed to the assertion by plaintiff of a claim against a third party who has been brought in under Rule 14), or, most significantly, class actions under Rule 23. The new statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990).

It cannot be doubted that prior to *Finley* it was understood that diversity is required only between the named representatives of the class and the opponents of the class. The House Judiciary Committee's citation of *Ben Hur* and *Zahn* (as Kaiser seems to recognize, p. 16 n.9) makes that clear, if indeed there could have been any doubt. Congress has undoubted power to adopt those rules. The requirement of complete diversity is a statutory requirement, not a constitutional one, and Congress may give the district courts jurisdiction over cases in which there is only minimal diversity. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-531 (1967). The rule for diversity jurisdiction in class actions is a subset of the established rule governing all representative actions. *See generally*, 13B C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND

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18. Indeed U.S. Gypsum recognizes this, even if rather grudgingly (p. 24, n.23).

PROCEDURE 2d § 3606 at 424-25 (1984). The law prior to *Finley* was that only the citizenship of the named parties mattered.[9] The law in all actions commenced on or after December 1, 1990, is that only the citizenship of the named parties matters and that if the court has diversity jurisdiction with regard to them, it can hear claims of other parties that are part of the same case or controversy within the meaning of Article III. Surely this Court has more important things to do than deciding whether to extend *Finley* far beyond its specific holding to exclude from federal court claims by unnamed nondiverse parties in suits brought prior to December 1, 1990, especially when Congress has made it explicit that it wants the courts to hear such claims and it wants to restore the law as it was known before *Finley*.

IV. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE APPROVAL OF THE LAQ CLASS SETTLEMENT BEING CHALLENGED BY NONSETTLING PETITIONER-CODEFENDANT WITHOUT STANDING.

The universal rule is that nonsettling defendants in multiparty actions do not have standing to object to a settlement with a codefendant except in narrow, constrained circumstances, *i.e.*, when defendants can demonstrate some prejudice through "a present or immediate injury in fact." *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type "likely to be redressed by a favorable decision." *Id.*; *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982). Kaiser Cement does

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[9] Shortly before the 1990 Act, Congress similarly validated and did not change the generally-accepted principle that the citizenship of the representative controls in representative suits including class actions brought under the diversity statute. Congress amended 28 U.S.C. § 1332 in 1988 to create a specific exception under § 1332(c)(2) for the representative of an estate or of an infant or incompetent in order to eliminate the device of manufacturing diversity by appointing a representative from another jurisdiction. 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE §§ 3640, 3641 Supp. 1991.

not even attempt to assert any present or immediate injury to it from the Lac d'Amiante du Quebec Ltee ("LAQ") settlement, in contrast to the petitioner in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), who had standing because "it would be obviously, and immediately injured if th[e] class-action judgment against it became final without binding the plaintiff class." *Id.* at 805. Phillips Petroleum Co. was the actual defendant in the action so it was vitally interested in how many plaintiffs were suing it directly. Kaiser's potential interest in the LAQ settlement is the protection of its contribution rights. Kaiser Cement acknowledges, however, that the settlement was purportedly designed to protect nonsettling defendants' contribution and indemnity rights, and the Third Circuit so found.

The only prejudice alleged by Kaiser Cement is the speculative and hypothetical possibility that a class member will challenge the settlement in a future proceeding, and as a result, Kaiser Cement's contribution and indemnity rights against LAQ may be diminished. However, it is axiomatic that the future *res judicata* effect of any judgment can only be determined by a later court. C. Wright, FEDERAL COURTS §72 at 483 (4th ed. 1983); RESTATEMENT SECOND OF JUDGMENTS §42 (1982). Moreover, even if such a future challenge were successful due to some defect in the settlement, then LAQ would not be protected by it,[20] and Kaiser Cement would be free to implead any third-party defendant, including LAQ, to test its contribution or indemnity rights in that collateral action.

It is the nature of a class action that frequently you cannot know exactly who is in the class until the claimants come in. Here, settling parties were fully aware of and contemplated at the time of the settlement (before the class definition was amended) the possibility that some class members (those from small school systems without friable asbestos and potentially no claim for punitive damages under state law) might be unable to

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20. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973) (After finding that publication of notice of securities fraud class action in two newspapers on two separate occasions was fatally insufficient, the court held that "all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to these proceedings will therefore be vacated.").

assert claims in excess of $10,000. All parties accepted that if such absent class members existed outside the court's jurisdiction, they would not be bound by the settlement with LAQ.[21] Thus, LAQ, and not Kaiser Cement, is the only party prejudiced under this scenario, and the only party with standing to complain.

Finally, Kaiser Cement challenges jurisdiction of the certified national class based on local action principles. Kaiser's local action argument is not a proper subject for review on a petition for writ of certiorari seeking review of a partial class settlement and there is no conflict among the courts of appeals. The claims are transitory claims that could have arisen and did arise anywhere, and everywhere. *Dayton Independent School District v. U.S. Mineral Products Co.*, C.A. No. B-87-0050-CA, slip op. at 10 (E.D. Tx. Feb. 14, 1989).

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

Herbert B. Newberg*
Harvey S. Kronfeld
Sandra L. Duggan
Roger P. Cameron
HERBERT B. NEWBERG, ESQ., P.C.
2300 Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 922-4740

David Berger*
Harold Berger
Warren D. Mullen
Thomas F. Hughes
Howard I. Langer
DAVID BERGER ATTORNEYS AT LAW
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Co-Local Counsel for Respondents - Class Plaintiffs
*Counsel Of Record

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21. LAQ stated in briefing before each of the courts below that it entered the settlement fully aware that it would not bind class members who are ultimately found to be outside of the trial court's jurisdiction, and that such class members could be free to seek individual relief. (App. A-7, A-10).

Of Counsel:

Charles Alan Wright, Esquire
727 E. 26th Street
Austin, TX 78705

Arthur R. Miller, Esquire
1545 Massachusetts Avenue
Cambridge, MA 02138

Arnold Levin, Esquire
Laurence S. Berman, Esquire
Levin, Fishbein, Sedran & Berman
320 Walnut Street, Suite 600
Philadelphia, PA 19106

Chair, Trial and Liability Committee for Respondents - Class Plaintiffs

Stanley J. Levy, Esquire
Levy Phillips & Konigsberg
90 Park Avenue, 31st Floor
New York, NY 10016

W. Robert Morgan, Sr., Esquire
Morgan Law Offices
1651 North First Street
San Jose, CA 95112

Alvin B. Lewis, Jr., Esquire
Hartman, Underhill & Brubaker
221 East Chestnut Street
Lancaster, PA 17602

Ellen Chapnick, Esquire
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, NY 10022

Daniel A. Speights, Esquire
Speights & Runyan
304 Lee Avenue
P.O. Box 685
Hampton, SC 29924

Edward J. Westbrook, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
Charleston, SC 29402

E. Robert Wright, Esquire
Thomas, Snell, Jamison,
Russell, Williamson & Asperger
2445 Capital St., P.O. Box 1461
Fresno, CA 93716

Frank J. Daily, Esquire
Quarles & Brady
411 E. Wisconsin Avenue
Milwaukee, WI 53202-4497

Ernest G. Kelly, Jr., Esquire
Evans, Petree, Cobb & Edwards
81 Monroe Avenue, Ste. 600
Memphis, TN 38103

Zell Davis, Jr., Esquire
McGee Jordan Shuey Gordon
Morris & Doner, P.A.
2328 10th Ave. North, Ste 300
Lake Worth, FL 33461

Robert E. Sweeney, Esquire
1500 Alluminating Building
55 Public Square
Cleveland, OH 44113

Martin Greitzer, Esquire
Greitzer & Locks
1500 Walnut St., 21st Floor
Philadelphia, PA 19102

Respondents-Class Plaintiffs' Executive Committee

Dated: March 29, 1991

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

Pretrial Order No. 273

[Filed December 17, 1990]

AND NOW, this 13th day of December, 1990, in consideration of the Plaintiffs' motion to amend the class definition, set forth in Pretrial Order No. 20, and the Defendants' responses thereto, it is ORDERED that the motion is granted and that the class definition is amended as proposed by the Plaintiffs. Only those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material will remain members of the Plaintiff Class.

BY THE COURT:

/s/ James McGirr Kelly

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM AND ORDER

[Filed December 17, 1990]

J. M. KELLY, J. **December 13, 1990**

Plaintiffs have moved this court to amend the class definition in these consolidated diversity actions. By Pretrial Order No. 20 (August 28, 1984) this court certified the Plaintiff Class as being comprised of all owners and operators of elementary and secondary schools in the United States. It appears that after several years of investigation and discovery the Plaintiffs have concluded that it would be appropriate to amend the class definition so as to include only those school systems that contain "friable" asbestos products, and thus only those school systems that can in good faith assert claims in excess of $10,000. Several defendants are in opposition to the proposed amendment of Pretrial Order No. 20, while one defendant, National Gypsum Company, supports the proposed amendment to the class definition. For reasons stated more fully below, this court will grant Plaintiffs' motion to amend the class definition.

Federal Rule of Civil Procedure 23(c)(1) provides, in reference to determinations that a case is maintainable as a class action, that "[a] determination once made can be altered or amended before a decision on the merits if, upon fuller development of the facts, the original determination appears unsound." In the extreme, this section of the rule permits a court to decertify a class and retract its approval of a litigation being brought as a class action. See *Valentino v. United States Postal Service*, 674 F.2d 56, n. 12 (D.C. Cir. 1982).

In more moderate circumstances, however, a court may merely alter or amend the class certification in keeping with its responsibility to reevaluate continually a case's class status as the case progresses. *See, e.g., Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948-9 (9th Cir. 1979). The Second Circuit enunciated a similar responsibility in *Lamphere v. Brown University*, 553 F.2d 714, 720 (2d Cir. 1977), emphasizing "the need for the district court to follow closely the developing evidence as to class-wide decision making and to take seriously its power under Rule 23(c)(1) to alter or amend its certification order before the decision on the merits."

At the time this litigation was initiated, the types and amounts of asbestos products, if any, that were contained in the thousands of school buildings were unknown. The class was properly certified thereafter as inclusive of all elementary and secondary school systems. More than seven years later, the Plaintiffs have not distinctly identified asbestos containment on a building-by-building basis. However, the Complaint has been amended to focus on the presence of *friable* asbestos as the basis for Plaintiffs' claims. Congress has also recently passed legislation specifying that school districts must inspect for any asbestos and initiate maintenance with respect to friable asbestos-containing materials located in their buildings. Asbestos Hazard Emergency Response Act of 1986 ("AHERA").

In light of these developments, the Plaintiffs' proposed amendment to the class definition, narrowing class membership to include only those school districts whose buildings contain friable asbestos products, appears proper. "Friable" asbestos has been defined as material, "which, when dry may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *See, e.g.*, Third Amended Complaint. That it is *friable* asbestos containment for which this class action is seeking relief is consistent with Congress's determination that *friable* asbestos is the type for which school [sic] must implement maintenance plans. Adjusting the class definition correspondingly will streamline this litigation, ensuring that critical issues will be common to all class members.

The defendants who are in opposition to the proposed amendment assert three main arguments. Defendants first claim

that it would be improper for this court to amend the class definition while diversity jurisdiction issues are pending before the Third Circuit. However, the fact that the Third Circuit is currently considering related jurisdictional issues does not prevent this court from properly managing the class. The Plaintiffs have suggested that the class definition be amended in order that only members with claims in excess of the required jurisdictional amount ($10,000) remain in the class. As that is required under *Zahn v. International Paper Co.*, 414 U.S. 291 (1983) [sic], it is not improper to consider the proposed amendment.

Second, the defendants in opposition assert that many class plaintiffs who have relied on the litigation will be unfairly excluded by the amendment without notice. The situations in which notice to absent class members is required under Rule 23 are limited. Notice is required when the court certifies a class under Rule 23(b)(3) because of common issues of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve claims. Fed.R.Civ.P. 23(c)(2). Notice is also required when a class action is to be dismissed or compromised. Fed.R.Civ.P. 23(e). In instances such as here, where an amendment to the class definition has been proposed, notice is not required but discretionary notification is encouraged where the plaintiff has shown that excluded class members: (1) received notice of their original inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion. *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989).

Plaintiffs' amendment will undoubtedly trim the class by excluding school districts whose buildings do not contain friable asbestos, however, those parties will not be unduly prejudiced as a result. As stated above it is the containment of *friable* asbestos for which Congress has required maintenance plans be implemented, and for which Plaintiffs have amended their Complaint to address. In light of these developments, it is no longer appropriate for any and every school district to remain a class member. It has become clear that *friable* asbestos is the focus of Plaintiffs' claim for relief. Any claims made by school districts not containing friable asbestos in their buildings are distinct and arguably would be prejudiced if forced to remain

and be tried side by side with friable asbestos claims. Notice to excluded class members of the redefinition of the class is not required under these circumstances.

The defendants' third basis for opposition to the proposed amendment centers around the meaning of the term "friable", suggesting that issues of vagueness and timing regarding friable asbestos mandate the rejection of Plaintiffs' proposed class redefinition. However, any questions needing to be resolved regarding the presence of friable asbestos products and the concomitant effects their resolution would have on class membership are no more problematic than those that occur in most class litigation. Although, as defendants state, the class definition must be reasonably specific, by nature the definition of a class and the subsequent determination of its membership require some inquiry and investigation as to the individual class members to ensure the propriety of their inclusion.

In *Crosby v. Social Security Administration of the United States*, 796 F.2d 576 (1st Cir. 1986), cited by the defendants, the class definition was rejected because it necessitated the determination of a subjective issue - what as a "reasonable time" within which a hearing should have been granted - for each individual potential class member. That is not this case. Here, under the proposed amendment, an *objective* determination - the existence of friable asbestos products in school buildings - will be used to determine membership in the class. This is not beyond the bounds of reasonable specificity for purposes of defining the class.

The issue of timing raised by the defendants does not prevent the proposed amendment to the class definition. All of the Plaintiffs' buildings were completely constructed prior to the initiation of this action. Thus the issue for purposes of determining membership in the class is simply whether or not the Plaintiffs' schools were constructed using asbestos materials that are friable, the term friable being defined as "*which, when dry*, may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *supra*, p. 3 (emphasis added). This does not require a determination of *when* each product becomes, or became friable. All that is necessary is for Plaintiffs to identify the school districts that

contain friable asbestos materials. All such school districts shall remain class plaintiffs under the amended class definition.

An appropriate order follows.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 90-1247
NO. 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

School District of Lancaster, et al.,

Plaintiffs

v.

Lake Asbestos of Quebec, Ltd., et al.,

Defendants.

United States Gypsum Company
and
Kaiser Cement Corporation,

Appellants.

Appeal From Final Judgment Of
The United States District Court For The
Eastern District of Pennsylvania.
Master File No. 83-0268

BRIEF OF APPELLEE
LAC d'AMIANTE du QUEBEC, LTEE

Edward W. Madeira, Jr.
Richard W. Foltz, Jr.
Matthew H. Adler
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103

Frederick B. Lacey
Jay G. Safer
Molly S. Boast
LeBOEUF, LAMB, LEIBY
& MacRAE
520 Madison Avenue
New York, New York 10022

Attorneys for Appellee
Lac d'Amiante du Quebec, Ltee

SUMMARY OF ARGUMENT

After more than six years of litigation, LAQ entered into an agreement to settle this certified nationwide class action for one million dollars. LAQ, a peripheral defendant in asbestos property damage litigation, was fully aware of the then-pending attacks on the District Court's subject matter jurisdiction when it entered into the settlement agreement; indeed, the agreement expressly acknowledged that the settlement would be voided if there were no subject matter jurisdiction.

* * *

Appellants, as part of their overall strategy to derail this litigation, objected to preliminary and final approval of the settlement before the District Court, on the ground that the District Court lacked subject matter jurisdiction to approve the settlement. They appeal here on the same ground, arguing that a partial settlement cannot become final in a diversity class action unless the damage claims of each absent class member are determined first. These objections are an attack on use of the class action device when a court's diversity jurisdiction is invoked, not an attack on the LAQ settlement itself. Appellants' speculation that some few class members exist over whose claims the District Court lacks jurisdiction does not give them standing to challenge final approval of the LAQ settlement. The settlement does not bind class members whose claims are less than $10,000, and it does not purport to do so. LAQ alone bears the risk of any uncertainty that certain claims may not be barred by the settlement. It has accepted the risk, and no one else should be heard to complain on its behalf.

* * *

ARGUMENT

* * *

C. These Appeals Should Be Dismissed Because Appellants' Claim of Legal Prejudice Procedure Is Wrong Both As A Matter of Fact And As A Matter Of Law.

* * *

. . . At this point, only LAQ bears the risk of not knowing the precise scope of the *res judicata* effect it obtained through its settlement, and LAQ has knowingly assumed that risk. The only

purpose served by these present appeals is the disruption of a settlement approval process that should only involve the District Court and the parties to the settlement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: SCHOOL ASBESTOS
LITIGATION

MASTER FILE
NO. 83-0268

THIS DOCUMENT RELATES TO:
ALL ACTIONS

LAC D'AMIANTE DU QUEBEC, LTEE'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE SETTLEMENT BETWEEN LAQ AND THE PLAINTIFF CLASS

THE OBJECTIONS FILED BY NON-SETTLING DEFENDANTS PRESENT NO VALID REASON FOR WITHHOLDING FINAL APPROVAL OF THE SETTLEMENT

Two non-settling defendants have also filed objections to final approval of the settlement. United States Gypsum Company ("USG") and Kaiser Cement Company ("Kaiser") have taken this opportunity to restate their twice-rejected challenge to this Court's subject matter jurisdiction. These defendants have no standing to repeat their jurisdictional arguments in this context.

Defendants assert that they have "a real stake in ensuring that their rights under the judgment reduction provision are recognized and that . . . class members will be bound by this obligation." Kaiser Objection at 2. This concern is unwarranted. The judgment reduction provisions of the settlement agreement are not applicable until a Class member obtains a judgment against a defendant. In order for a Class member to obtain a valid judgment in this action, the Court must have subject matter jurisdiction and the judgment reduction provision will

accordingly, be binding on that Class member. If the Court were to determine that it did not have subject matter jurisdiction over a Class member's claims, that Class member is not bound by the settlement agreement, but neither will any defendant be liable to that Class member in this litigation.* Thus, non-settling defendants lack standing to object to the settlement even on the limited basis they propose.

*Moreover, Class members whose claims were not within the Court's subject matter jurisdiction would not be subject to any judgment reduction as a result of the LAQ settlement because they would not be entitled to participate in the settlement proceeds.